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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SCC ACQUISTIONS, INC., et al., Plaintiffs and Respondents, v. CENTEX HOMES et al., Defendants and Appellants.	G041486 (Super. Ct. No. 30-2008-00112701) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Kirk H. Nakamura, Judge. Request for Judicial Notice. Order affirmed. Request denied.

Parker Mills, Parker Shumaker Mills, David B. Parker, William K. Mills and Justin D. Denlinger for Defendants and Appellants.

Miller Barondess, Louis R. Miller, Mira Hashmall and James M. Miller for Plaintiffs and Respondents.

* * *

Defendants Centex Homes, Newmeyer & Dillion, LLP, and Shawn E. Cowles, a lawyer in that firm (the latter two sometimes collectively referred to as defendant lawyers), appeal from the denial of their special motion under Code of Civil Procedure section 425.16 (anti-SLAPP motion; all further statutory references are to this code unless otherwise designated) to strike the complaint of plaintiffs SCC Acquisitions and Bruce Elieff for malicious prosecution, negligence, breach of fiduciary duty, and declaratory relief. Defendants claim the court erred because the claims arise from protected activity and plaintiffs did not demonstrate they had a probability of prevailing on the merits. We disagree and affirm.

FACTS AND PROCEDURAL HISTORY

In the underlying action defendant lawyers, on behalf of Centex, sued SJD Partners, Ltd. (SJD), for breach of contract, breach of the implied covenant of good faith and fair dealing, and declaratory relief arising out of a contract to purchase real property.

In years prior defendant lawyers had represented the parent of SJD, SunCal, several subsidiaries of SunCal, including SCC, and Elieff in real estate transactions in general and in one litigation matter (*Barthell v. SunCal Companies* (Orange County Superior Court, Case No. 818536) (*Barthell* case)) where plaintiffs and their affiliates were sued. In the course of that case plaintiffs provided defendant lawyers with a substantial amount of confidential information about plaintiffs, SunCal (the parent company), and SunCal's subsidiaries, including their "comprehensive books and records."

In the underlying action defendants served SCC as a Doe defendant and amended the complaint to add alter ego allegations against it. SCC filed a cross-complaint for declaratory relief seeking a declaration there was no alter ego liability.

Subsequently Centex won a motion for summary adjudication against SJD on the breach of contract claim. The court then tried Centex's remaining claims for breach of the covenant of good faith and fair dealing and declaratory relief against SJD only and ruled against Centex, stating that the "transaction was . . . arm[']s length . . . between two sophisticated parties . . . used to dealing with these types of contract" and there was "[n]o special relationship . . . between" SJD and Centex to support any damages beyond those for ordinary breach of contract. On ex parte motion Centex then filed a second amended complaint containing the original three causes of action with SJD remaining a party and adding several additional defendants related to SCC, including CWC, Inc. and Elieff. The complaint alleged all defendants were the alter egos of each other.

On the eve of trial Centex dismissed the complaint without prejudice. Plaintiffs' cross-complaint for declaratory relief remained with a trial set. On the day of trial defendants dismissed the complaint with prejudice, after which plaintiffs dismissed their cross-complaint with prejudice.

Plaintiffs then filed this action. The malicious prosecution cause of action against all defendants is based on the claim of alter ego. The negligence, breach of fiduciary duty, and declaratory relief claims, against defendant lawyers only, arise out of use of documents in the underlying action that the lawyers had obtained in the *Barthell* case.

Additional facts are set out in the discussion.

DISCUSSION

1. Introduction

Section 425.16, subdivision (b)(1) provides that a cause of action against a person arising from an act in furtherance of a constitutionally protected right of free

speech may be stricken unless the plaintiff establishes the probability he will prevail on the claim. There is a two-step analysis under this section. First there is a determination as to whether the defendant has met its burden to show "that the challenged cause of action is one arising from protected activity." (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733.) If so, the burden shifts to the plaintiff to show the likelihood of prevailing on the claim. (*Ibid*.)

We review an order granting an anti-SLAPP motion de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326.) "'We consider "the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based." [Citation.] However, we neither "weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." [Citation.]' [Citations.]" (*Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1036.) The intent of the statute is to prevent "chill[ing] the valid exercise of . . . freedom of speech and petition . . . through abuse of the judicial process" and to that "end, th[e] section [is to] be construed broadly." (§ 425.16, subd. (a).)

To show the likelihood of prevailing on the merits plaintiffs had to "'demonstrate that the complaint [was] both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence [it] submitted . . . [was] credited.' [Citations.]" (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.) We examine both parties' pleadings and evidentiary support (§ 425.16, subd. (b)(2)) but do "not weigh the credibility or comparative probative strength of competing evidence" and will "grant the motion if, as a matter of law, the defendant[s'] evidence supporting the motion defeats the plaintiff[s'] attempt to establish evidentiary support for the claim. [Citation.]" (*Wilson v. Parker, Covert & Chidester, supra*, 28 Cal.4th at p. 821, italics omitted.)

2. Malicious Prosecution Claim

a. Protected Activity

A complaint for malicious prosecution is an act "in furtherance of the . . . right of petition or free speech under the United States or California Constitution in connection with a public issue . . ." (§ 425.16, subd. (b)(1)), which is defined as including "any written or oral statement or writing made before a . . . judicial proceeding . . . ." (§ 425.16, subd. (e)(1)). A malicious prosecution suit falls within section 425.16, subdivision (b)(1). (*Jarrow Formulas, Inc. v. LaMarche*, *supra*, 31 Cal.4th at p. 734.) Thus, as to this cause of action, the only issue is whether plaintiffs have made out a prima facie case.

b. Plaintiffs' Prima Facie Case

To succeed on their malicious prosecution claim, plaintiffs must show that the underlying action "'(1) was commenced by or at the direction of [defendants] and was pursued to a legal termination in [plaintiffs'] favor [citations]; (2) was brought without probable cause [citations]; and (3) was initiated with malice [citations].' [Citation.]" (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 676.)

Plaintiffs allege defendants sued them on a spurious alter ego theory based on information obtained in the course of their representation of plaintiffs in the *Barthell* case, knowing they had no probable cause to do so. Defendants persisted in pursuing the action even after plaintiffs "unequivocally demonstrated" to them the claims had no merit. Plaintiffs further allege no reasonable attorney would have filed the underlying action based on these allegations. They plead defendants acted with malice in filing and pursuing the claims against them. The complaint alleges defendants dismissed the action with prejudice, a termination on the merits in favor of plaintiffs.

1) Favorable Termination

"'"[W]hen the underlying action is terminated in some manner other than by a judgment on the merits, the court examines the record 'to see if the disposition reflects the opinion of the court or the prosecuting party that the action would not succeed.'" [Citations.]' [Citation.] 'Should a conflict arise as to the circumstances of the termination, the determination of the reasons underlying the dismissal is a question of fact. [Citation.]' [Citation.]" (*Sycamore Ridge Apartments, LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1399.)

Sycamore Ridge, where the defendants appealed denial of their anti-SLAPP motion, is comparable to our case. There, the plaintiff in the underlying action dismissed the complaint without prejudice. Subsequently she dismissed the action with prejudice in exchange for the defendant's waiver of costs. The appellate court held this constituted a favorable termination, stating: "'"[A] voluntary dismissal, even one without prejudice, may be a favorable termination which will support an action for malicious prosecution. [Citation.] 'In most cases a voluntary unilateral dismissal is considered a termination in favor of the defendant in the underlying action . . . .'"' [Citation.] [**¶**] Although [the plaintiff in the underlying action] had not given up her option to file a new action . . . at the time she voluntarily dismissed her claims, the underlying action was terminated upon the initial dismissal. That [she] later agreed to give up her right to file another suit . . . in exchange for a waiver of costs does not alter the fact that she unilaterally voluntarily dismissed her claims. For these reasons . . . [the plaintiff] made a sufficient prima facie showing that [defendant's claims in the underlying action] were terminated in [the plaintiff's] favor." (*Sycamore Ridge Apartments, LLC v. Naumann, supra,*157 Cal.App.4th at p. 1401.)

Here, defendants claim there was no termination on the merits because they dismissed the underlying action without prejudice to avoid incurring additional costs and attorney fees and subsequently filed a dismissal with prejudice in exchange for plaintiffs'

dismissal of its cross-complaint for declaratory relief. Plaintiffs dispute these assertions, arguing defendants initially dismissed the complaint because they knew they could not prevail and still faced litigating the cross-complaint. They also maintain there was never an agreement they would dismiss the cross-complaint in exchange for dismissal with prejudice of the complaint.

The record supports plaintiffs' version of events sufficiently to satisfy their requirement to make out a prima facie case. Although defendant lawyers stated to the trial court they were dismissing without prejudice to avoid additional costs, the court suggested that if defendants "want[ed] to back up what you're saying just dismiss it with prejudice saying we don't have the money to continue, but you're saying basically we just don't want to continue today, maybe we'll continue tomorrow or the next day. But if you don't have the money to continue, dismiss it with prejudice [and] then we know for sure you're not continuing." Plaintiffs' counsel informed the court they had suggested a settlement of mutual dismissals but defendant lawyers refused without entry of a judgment against Centex to avoid a malicious prosecution claim. Plaintiffs proposed dismissal of the complaint and the cross-complaint with prejudice with the parties bearing their own fees and costs, but defendants refused. The court noted that many of the attorney fees had been generated by defendants' methods of litigation and if they had a "great case" as they "keep saying," "go on your case."

Moreover, the declaration of Louis Miller, plaintiff's current counsel, sets out sufficient evidence that there was no agreement prompting defendants' dismissal of the complaint with prejudice. In an e-mail to defendant lawyers he states clearly that plaintiffs were not settling but rather, once defendants dismissed with prejudice as they planned to do, there would be no justiciable controversy and plaintiffs would dismiss the declaratory relief cross-complaint without prejudice as moot. Miller reiterated that position at a hearing on the matter.

Under the rule set out in *Sycamore*, even a dismissal without prejudice is generally considered a favorable termination. And as to the dismissal without prejudice, defendants' interpretation of the events surrounding it is not borne out by the facts. Thus, plaintiffs made out a prima facie case of termination on the merits.

Defendants interpret a statement by the court at that same hearing that "[t]here's no decision on anything" to mean there was no favorable termination. But that was not its context. It was stated in connection with a ruling that plaintiffs were not entitled to a judgment on defendants' dismissal with prejudice.

Defendants' reliance on *Oprian v. Goldrich, Kest & Associates* (1990) 220 Cal.App.3d 337 is not well taken. In the context of a summary judgment there was nothing to dispute the evidence that the dismissal was to avoid further litigation costs after trial and reversal on appeal.

We are unsure of the point defendants are trying to make when they assert that once they filed the dismissal without prejudice the court lost jurisdiction of their complaint and that their dismissal with prejudice "was a nullity." But, as plaintiffs point out, defendants requested that the complaint be dismissed with prejudice and it was.

2) Probable Cause

A party does not have probable cause if it advances a legal theory of recovery "which is untenable under the facts known to [it]." (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 165.) "In making its determination whether the prior action was legally tenable, the court must construe the allegations of the underlying complaint liberally in a light most favorable to the malicious prosecution defendant." (*Id.* at p. 165.)

Probable cause is a question of law. The test is whether "'any reasonable attorney would have thought the claim tenable.' [Citation.]" (*Wilson v. Parker, Covert & Chidester, supra*, 28 Cal.4th at p. 817.) "Only those actions that "'any reasonable

attorney would agree [are] totally and completely without merit'" may form the basis for a malicious prosecution suit. [Citation .]" (*Ibid*.)

The complaint alleges defendants had no probable cause to file and proceed on an alter ego theory because there was no legal or factual basis for it. Further, plaintiffs advised defendants several times during the litigation the alter ego case had no merit and produced documents as evidence. Elieff's and Miller's declarations stated SJD was a limited liability partnership created to develop a particular project. They also declared Centex had used this same type of entity for their own development projects and that it is standard in the real estate industry to do so. In the decision after the trial on the breach of the covenant of good faith and fair dealing and declaratory relief against Centex, the trial court ruled the parties were sophisticated and commonly used these types of real estate contracts. Elieff declared that SJD, SCC, and the related companies maintain all corporate formalities, including record keeping and segregation of funds. He also stated that during the *Barthell* case, the lawyers obtained information about ownership and observation of corporate formalities by SJD, SCC and related entities, as well as Elieff's own financial information, and therefore knew there was no basis for an alter ego claim.

Tom Rollins, the Chief Accounting Officer of SunCal Management, LLC, an entity related to SJD and SCC, stated in his declaration that all the financial records of SJD from its inception were produced to defendants in the underlying action. He also described the record keeping process for SJD, including compliance with generally accepted accounting principles and an audit by an outside accountant showing no commingling of funds. In his declaration Miller set out his examination of plaintiffs' compliance with corporate formalities and described his communications with defendants explaining why there was no basis for the alter ego allegations. This meets plaintiffs' burden to show the probability of success in proving defendants' lack of probable cause.

Defendants rely almost exclusively on their expert, Jaime Holmes, a lawyer and CPA, who filed a declaration in support of their motion, who opined that plaintiffs

were the alter egos of SJD. He based it on financial records produced by plaintiffs. Attached to his declaration was a report he had prepared in the underlying action where he set out numerous factors on which he relied to support his opinion. Defendants contend that, based on this opinion, they believed they would prevail on their alter ego claim.

Defendants request we take judicial notice of other cases in which plaintiffs and the related entities allegedly have been sued on a claim of alter ego. In ruling on the anti-SLAPP motion the trial court refused to take judicial notice of these documents as incomplete, irrelevant, and unauthenticated. Defendants did not appeal this ruling. The request for judicial notice is not a proper way to present these documents to us and we will not consider them.

Because probable cause is a legal question, an expert's opinion generally is inadmissible. (*Summers v. A.L. Gilbert Co*. (1999) 69 Cal.App.4th 1155, 1178-1179.) And in evaluating whether plaintiffs have made out a prima facie case, we "do[] not weigh the credibility or comparative probative strength of competing evidence." (*Wilson v. Parker, Covert & Chidester, supra,* 28 Cal.4th at p. 821, italics omitted.) Whether Holmes' opinion is sufficient evidence to show that a reasonable attorney would have found merit in the alter ego claims, it does not defeat plaintiffs' showing as a matter of law. (*Id*.) There was a sufficient showing of lack of probable cause.

3) Malice

Malice deals with "'the subjective intent or purpose with which the defendant acted in initiating the prior action. [Citation.] The motive of the defendant must have been something other than that of bringing a perceived guilty person to justice or the satisfaction in a civil action of some personal or financial purpose. [Citation.] The plaintiff must plead and prove actual ill will or some improper ulterior motive.'

[Citations.]" (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 292, italics omitted.)

In the complaint plaintiffs allege defendants filed and prosecuted the action for almost a year to harass plaintiffs and to "extort a settlement." They continued with the case to "drive up" plaintiffs' legal expenses and caused them to incur over $1 million in expenses. They also plead defendants pursued the action based on hatred and ill will toward plaintiffs and due to "bad blood" resulting from plaintiffs' malpractice action against defendant lawyers resulting from representation in the *Barthell* case.

Elieff reiterates in his declaration that defendant lawyers' ill will spans several years, originating with plaintiffs' malpractice action brought after they lost the *Barthell* case, and that defendants "have been looking for a way to retaliate . . . ."

This is sufficient to make out a prima facie case of malice. Ill will and an improper purpose are set out. Moreover, malice may be inferred from a lack of probable cause. (*Drummond v. Desmarais* (2009) 176 Cal.App.4th 439, 452.) And because malice is rarely admitted, it may be shown by circumstantial evidence. (*Paulus v. Bob Lynch Ford, Inc*. (2006) 139 Cal.App.4th 659, 675.)

Since the malicious prosecution cause of action is subject to section 425.16 and plaintiffs showed the probability of prevailing on their claim, the court properly denied the anti-SLAPP motion on this claim.

3. Duty Claims

The causes of action for breach of fiduciary duty, negligence, and declaratory relief are against defendant lawyers only. In the redundant and somewhat histrionic complaint plaintiffs allege that while representing them during the *Barthell* case defendant lawyers obtained their confidential records, including those dealing with finances and operation of the companies. They also obtained plaintiffs' trust and confidence and owed them a duty of loyalty and care on which plaintiffs relied.

Defendant lawyers breached this duty when they took an adversarial position to plaintiffs by filing the underlying action using information and documents obtained in the *Barthell* case, preferring the interest of Centex, their new client, over that of plaintiffs. In so doing they violated the Rules of Professional Conduct, Rule 3-100 and Business and Professions Code sections 6068 and 6167.

In the declaratory relief cause of action plaintiffs allege that they demanded return of all documents defendant lawyers obtained from them in connection with the *Barthell* case.

a. Protected Activity

"Speaking to the first prong, the California Supreme Court explains that '[t]he statutory phrase "cause of action . . . arising from" means simply that the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.] . . . [T]he critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech. [Citations.] "A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e) . . . ."' [Citation.] It is 'the *principal thrust* or *gravamen* of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies [citation], and when the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute.' [Citation.]" (*Freeman v. Schack* (2007) 154 Cal.App.4th 719, 727.)

The gravamen of the complaint is defendant lawyers' use of plaintiffs' documents they obtained during the *Barthell* action. The declarations are consistent. Plaintiffs try to recast the complaint to assert that the thrust of their allegations is defendants' abandonment of them and their interests by representing Centex against

them. In so doing they rely on *Freeman v. Schack, supra,* 154 Cal.App.4th 719 and *Benasra v. Mitchell Silberberg & Knupp LLP* (2005) 123 Cal.App.4th 1179.

Defendant lawyers counter that the complaint does not challenge their representation of Centex. There is no claim plaintiffs objected to that representation. The only wrongdoing alleged is defendant lawyers' use in the underlying action of information obtained during the *Barthell* case. This, defendant lawyers argue, is protected speech under section 425.16 (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 674) and the Civil Code section 47, subdivision (b) litigation privilege.

We need not determine which argument is correct. If defendant lawyers' action is not protected their motion was not well taken. If it is protected, the motion still fails because, as shown below, plaintiffs presented a prima facie case for the causes of action at issue.

b. Plaintiff's Prima Facie Case

The elements of a cause of action for breach of fiduciary duty are the duty, breach, and damages proximately caused. (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086.) Similarly, a cause of action for negligence requires proof of a duty, breach, and damages proximately caused. (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1208.) The complaint alleges these elements. Defendant lawyers owed a duty to keep confidential plaintiffs' information disclosed in the course of their representation of them in the *Barthell* case. They allegedly breached that duty by using the information in filing suit against them in this action and later in discovery. Finally, plaintiffs allege they were damaged by having to defend the action.

California Rules of Professional Conduct, Rule 3-100(A) provides: "A member shall not reveal information protected from disclosure by Business and Professions Code, section 6068, subdivision (e)(1) without the informed consent of the

client . . . ." Business and Professions Code, section 6068, subdivision (e)(1) states, in part, that the duty of a lawyer is "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Pursuant to this section and rule, "to protect the sanctity of the confidential relationship" "an attorney is forever forbidden from using, against the former client, any information acquired during [a prior confidential] relationship . . . ." (*Styles v. Mumbert* (2008) 164 Cal.App.4th 1163, 1167.)

Defendants do not deny using certain documents acquired during their representation of plaintiffs during the *Barthell* case. They argue, however, that the documents are no longer confidential because they were put into evidence in the trial of that matter and because they belonged to a related entity, CWC, not plaintiffs. But this argument is limited to three so-called CWC documents defendant lawyers relied on to bolster their contention plaintiffs had not produced all documents requested in discovery. But the complaint and plaintiffs' declarations do not limit their claims to these three documents. Rather, plaintiffs state they disclosed extensive information and produced a substantial number of documents to defendant lawyers during the *Barthell* case that defendant lawyers then used in the underlying action without plaintiffs' consent. This conduct goes far beyond using three documents in discovery. Even assuming defendant lawyers' arguments about confidentiality are correct, there is no evidence that all of plaintiffs' documents were introduced in the *Barthell* case or otherwise were made public.

Plaintiffs have made out a prima facie case for the breach of fiduciary duty and negligence claims sufficient to uphold denial of the anti-SLAPP motion. The declaratory cause of action rises and falls with the other two and the motion as to the cause of action also fails.

DISPOSITION

The order denying the motion is affirmed. The request for judicial notice is denied. Respondents are entitled to costs on appeal.

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

IKOLA, J.